

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AQUA ILLINOIS, INC.	:	
	:	Docket No. 10-0194
Proposed increase in general water rates for	:	
its Kankakee service area.	:	

REPLY BRIEF ON EXCEPTIONS OF AQUA ILLINOIS, INC.

Aqua Illinois, Inc. (“Aqua” or the “Company”) hereby submits to the Illinois Commerce Commission (“Commission”) its Reply Brief on Exceptions in accordance with the Administrative Law Judges’ established schedule and, in support thereof, states as follows:

I. EXECUTIVE SUMMARY

The Illinois Attorney General (“AG”) continues to urge the Illinois Commerce Commission (“Commission”) to enter an order based upon the untested conjecture of counsel, and information not part of the evidentiary record. The AG improperly cites to information that is not part of the evidentiary record, and concocts claims never presented in testimony, or subject to cross-examination. Not only is this approach inappropriate, it deprived Aqua and Staff the opportunity to respond to the AG’s erroneous and unsupported allegations, which appeared for the first time in the AG’s Initial Brief and again in its Brief on Exceptions. In short, the AG asks the Commission to accept the untested conjecture of counsel instead of Company and Staff witnesses who have spent the time, and made the effort, to analyze the issues and present that analysis for cross-examination.

In stark contrast, the Company and Staff witnesses conducted substantial analysis, presented testimony and supporting exhibits, all of which are part of the evidentiary record. These witnesses were made available for cross-examination in order to test their analysis and

conclusions. The evidentiary record is clear and unambiguous, and demonstrates that a revenue requirement increase of \$3,239,493 is just and reasonable. The following explains in detail why the AG's claims in its Brief on Exceptions should be rejected.

II. COMMENTS FROM PUBLIC HEARINGS ARE NOT EVIDENCE

The AG argues that the Order in this proceeding “must address the comments submitted by public participants more directly and thoroughly.” AG BOE at 1. This is another ploy by the AG to turn public comments into record evidence. To include specific comments in the Order implies that it is evidence that the Commission could rely upon—this is not only misleading to ratepayers but contrary to the law.

Illinois law is clear: these public hearing comments are not, nor could they be, part of the evidentiary record in this proceeding; and thus, should not be considered. Indeed, the Commission has confirmed this position in a recent ruling as discussed below. Section 10-103 of the Public Utilities Act (“Act”) states:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission **shall be based exclusively on the record** for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act.

220 ILCS 5/10-103 (emphasis added). Further, Section 10-35(a) of the Illinois Administrative Procedure Act (“APA”) states as follows:

The record in a contested case shall include the following:

- (1) All pleadings (including all notices and responses thereto), motions, and rulings.
- (2) All evidence received.

- (3) A statement of matters officially noticed.
- (4) Any offers of proof, objections, and rulings thereon.
- (5) Any proposed findings and exceptions.
- (6) Any decision, opinion, or report by the administrative law judge.
- (7) All staff memoranda or data submitted to the administrative law judge or members of the agency in connection with their consideration of the case that are inconsistent with Section 10-60 [5 ILCS 100/10-60].
- (8) Any communication prohibited by Section 10-60 [5 ILCS 100/10-60]. No such communication shall form the basis for any finding of fact.

5 ILCS 100/10-35(a). Section 10-35(c) also provides that “[f]indings of fact shall be based **exclusively** on the evidence and on matters officially noticed.” 5 ILCS 100/10-35(c) (emphasis added). The Illinois Supreme Court expressly recognized that “[a]ny order of the Commission must ‘be based exclusively on the record’.” *Business & Professional People for Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 227 (1989) (citing Ill. Rev. Stat. 1987, Ch. 111 2/3, par. 10-103 (now 220 ILCS 5/10-103)).

Thus, findings and conclusions in a Commission order must be based upon evidence that is contained in the record. Indeed, in a recent Utilities, Inc. rate case, the Commission rejected an intervenor’s attempts to inject untested claims from public hearings for consideration.¹ The Commission denied the Petition for Interlocutory Review. *See* ICC Docket No. 09-0548/09-0549 (Cons.), Notice of Comm’n Action (Jul. 29, 2010). The Commission recognized that public comments are not part of an evidentiary record. In particular, Chairman Flores stated “the PUA requires us here at the Commission to make our decisions based on the evidentiary record, and that speaks to the need for people to offer testimony under oath.” ICC Docket No. 09-0548/09-0549 (Cons.), Commission Minutes, Tr. at 13 (Jul. 28, 2010). The Proposed Order’s

¹ In that proceeding, two property owner associations sought to include public comments in their Initial Brief. Staff filed a motion to strike, which was granted by the Administrative Law Judge.

treatment of the public comments is consistent with the Commission's treatment in previous orders. To include public comments in the Order results in confusion and misrepresents weight given to these comments under the statute. For these reasons, AG's attempt to incorporate public comments in the Order should be rejected.

III. AQUA'S MISCELLANEOUS EXPENSES ARE PROPER AND SUPPORTED BY THE RECORD

The AG continues to argue that Aqua's Miscellaneous Expenses are overstated. Again, the AG offers a simplistic analysis that cannot be found in the evidentiary record. Rather, the AG improperly attempts to present a factual analysis in its brief. AG BOE at 5-7. Not only does the AG proposal lack merit, it did not offer any evidence to rebut Aqua's evidence.

The AG asserts that Aqua did not meet its burden of proof. AG BOE at 7. However, Aqua has provided substantial and compelling evidence to support its proposed revenue requirement. Staff agrees, subject to selected adjustments. Aqua/Staff Ex. 1 (the "Stipulation"); Aqua Init. Br., Att. 1 (Errata filed on Oct. 5, 2010). Moreover, the AG has failed to present any evidence to refute Aqua's and Staff's proposed revenue requirement.

Aqua bears the burden of proof that its proposed rates are just and reasonable. 220 ILCS 5/9-201(c). However, that does not mean that it is the only party that has to prove its claims. Case law is clear: "In proceedings before the Commission, once a utility makes a showing of the costs necessary to provide service under its proposed charges, it has established a prima facie case. *The burden then shifts to others* to show that the costs incurred by the utility are unreasonable because of inefficiency or bad faith." *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 327 Ill. App. 3d 768, 776 (3d Dist. 2002) (emphasis added) (citations omitted)

Aqua has met its burden. The AG, however, has not. Through its Part 285 filing, sworn testimony and other exhibits admitted into evidence, Aqua provided detailed evidence supporting

its Miscellaneous Expenses. After investigating and analyzing Aqua's schedules, engaging in discovery, and filing sworn testimony proposing adjustments based upon its investigation, Staff agrees subject to certain adjustments. Aqua/Staff Ex. 1; Aqua Init. Br., Att. 1 (Errata filed on Oct. 5, 2010).

In contrast, the AG makes unsubstantiated claims without providing any testimony in evidence.² In essence, the AG's argument boils down to a claim that these costs fluctuate too much. However, there is no evidence that the costs are not reasonable, legitimate costs of Aqua. The Commission is "without authority to arbitrarily reduce an allowance shown to have been actually paid." *The Peoples Gas Light and Coke Co. v. Slattery*, 373 Ill. 31, 61 (1939)). Where amounts of operating expenses are capable of definite proof, they may not be reduced by estimates of what the expenses should have been "unless there is further showing that, for some reason, the amount was improperly increased over a legitimate cost." *Id.* at 61-62. With its Part 285 filing and sworn testimony, Aqua provided substantial, compelling evidence supporting its Miscellaneous Expenses. Staff analyzed these costs in depth and proposed adjustments to which Aqua does not object.

The AG's adjustment must be rejected as it is without merit. The Commission should approve Aqua's proposed Miscellaneous Expenses as adjusted by Staff.

IV. THE PROPOSED ORDER CORRECTLY ADOPTS A COST OF COMMON EQUITY OF 10.03% AS SUPPORTED BY THE RECORD

The Proposed Order properly concludes that the cost of common equity is 10.03%. Aqua and Staff are the only parties that presented evidence analyzing and proposing a reasonable return on common equity ("ROE") for the Company's Kankakee Division. After considering all of the information in the evidentiary record, Aqua and Staff stipulated to a reasonable ROE of

² Because the AG's proposals are made in its initial brief, Aqua and Staff are deprived from responding to the AG claims and testing such claims through cross-examination.

10.03%. Consequently, the AG's claim that the proposed ROE is overstated is false and not supported by the record. AG BOE at 13.

The AG argues that the Stipulation entered into between Aqua and Staff should be rejected, and that Staff's originally proposed rate of return that utilized a ROE of 9.61% should be approved. Other than citing to Staff testimony, the AG provides no evidence to support its position. However, the Stipulation **adopts Staff's entire rate of return position**, with one exception—that the weighting of Staff's Water Sample Group and Utility Sample Group were adjusted to account for the small sample size. This is supported by Aqua and Staff testimony and results in a reasonable ROE for Aqua.

Aqua's and Staff's rate of return recommendations contained a number of similarities, including: (1) the amount of long-term debt in capital structure; (2) the cost of long-term debt; and (3) the cost of preferred stock. In rebuttal testimony, Aqua agreed to all of Staff's components of rate of return except for the cost of common equity. Walker Reb., Aqua Ex. 6.0 Rev., 33:701-12. The calculation of the cost of common equity remained at issue. In particular, Aqua objected to the size of Staff's Water and Utility Sample Groups, which was the basis of its cost of common equity calculation. *Id.*, 5:104-12:265; Walker Sur., Aqua Ex. 9.0, 5:107-8:178. Following the filing of surrebuttal testimony, Aqua and Staff agreed that the cost of common equity estimates for smaller samples are prone to more measurement error. Kight-Garlich Reb., Staff Ex. 8.0, 5:97-98; Walker Sur., Aqua Ex. 9.0, 7:150. Thus, Aqua and Staff agreed to use Staff's proposed ROE analysis, subject to revising the weighting of Staff's Water and Utility Sample Groups to the following: 1/3 weighting to Staff's Water Sample and 2/3 weighting to Staff's Utility Sample. Aqua/Staff Ex. 1.0; Aqua Init. Br., Att. 1 (Errata filed on Oct. 5, 2010). As such, Aqua's cost of common equity should be 10.03%.

The AG continues its improper characterization of the Stipulation and implies that it is not truly supported by Staff. See AG Init. Br. at 16. The AG states that “Ms. Kight-Garlich did not revise her testimony to match the conclusions of the Stipulation.” AG BOE at 11. The AG ignores the reality that Aqua witness Walker did not modify his testimony either. However, this did not change the result that following the filing of Aqua’s surrebuttal testimony, both Staff and Aqua determined that Staff’s analysis was proper if there was a slight shift in the weighting of Staff’s Water and Utility Sample Groups. Furthermore, the AG had every opportunity, but declined to cross-examine Staff witness Ms. Kight-Garlich on this very issue. Tr. at 148:4-6 (Aug. 26, 2010).

The AG simply has no evidentiary basis to propose an alternate ROE and instead resorts to manipulating facts and mischaracterizing party positions. In contrast, Aqua and Staff have used record evidence, explained the adjustment in weighting through a Stipulation, and have offered its witnesses for cross-examination in support of the Stipulation and their 10.03% ROE conclusion. For these reasons, the Commission should approve the 10.03% ROE and reject the AG’s proposal.

V. CONCLUSION

Therefore, for the foregoing reasons, Aqua Illinois, Inc. respectfully requests that the Commission reject the arguments set forth in the Attorney General’s Brief on Exceptions and adopt the Proposed Order subject to the Company’s exception as discussed its Brief on Exceptions.

Dated: November 19, 2010

Respectfully submitted,

AQUA ILLINOIS, INC.

By: /s/ John E. Rooney
One of the attorneys for
Aqua Illinois, Inc.

John E. Rooney
Carla Scarsella
Rooney Rippie & Ratnaswamy LLP
350 West Hubbard Street, Suite 430
Chicago, Illinois 60654
(312) 447-2800
john.rooney@r3law.com
carla.scarsella@r3law.com

CERTIFICATE OF SERVICE

I, John E. Rooney, hereby certify that I caused a copy of the Reply Brief on Exceptions of Aqua Illinois, Inc. to be served upon the service list in Docket No. 10-0194 by email on November 19, 2010.

/s/ John E. Rooney

John E. Rooney